

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HUMC OPCO LLC, .
Plaintiff, . . Case No. 16-cv-00168
vs. . Newark, New Jersey
UNITED BENEFIT FUND, et al., . June 14, 2016
Defendants. . .

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 3:05 P.M.)

3 THE COURT: All right. We are on the record HUMC
4 DBA Carepoint Health versus United Benefit Fund, Aetna, et
5 al., Civil No. 16-168 to address a discovery dispute that the
6 parties have presented in separate letters, I would note,
7 which is a direct violation of paragraph 5 of the Court's
8 scheduling order. I'm not sure what's up with that.

9 Let me have appearances, please, beginning with
10 plaintiff.

11 MR. BARBATSULY: Good afternoon, Your Honor, you
12 have George Barbatsuly, Stacey Hyman, and Tony La Rocco for
13 the plaintiffs, K&L Gates.

14 THE COURT: And for the defense?

15 MR. LISTHAUS: You have Bruce Listhaus with Gorlick
16 Kravitz & Listhaus, as well as Mark Ginsberg representing UBF
17 and Aetna.

18 | THE COURT: All right.

19 MR. HIRSCHHORN: Good afternoon, Your Honor, for
20 defendant Omni, Russell Hirschhorn speaking, and with me is
21 Joe Clark and Alychia Buchan.

22 THE COURT: Okay. So as I understand it --
23 originally I had required parties to come into court for an
24 in-court conference and meet-and-confer regarding myriad
25 discovery disputes. The parties told me yesterday they had

1 resolved all except one. And that concerned what -- what I
2 understand to be third-party discovery that the plaintiff
3 wants to take regarding grandfathering or whether this --
4 yeah, whether the plan is grandfathered under the Affordable
5 Care Act. Is that correct.

6 MALE SPEAKER: That's correct, Your Honor.

7 THE COURT: All right. So since --

8 MR. HIRSCHHORN: Your Honor, it's Russell
9 Hirschhorn, if I may.

10 THE COURT: Yeah.

11 MR. HIRSCHHORN: I don't think it's -- it's
12 accurate to say that there's -- appears to be one discovery
13 dispute, but I think, Your Honor, that there's a threshold
14 subject matter jurisdictional issue that we have to discuss
15 before -- with respect -- before getting into discovery
16 issues. It is the contention of the defendants -- one of the
17 defendants that the plaintiff is -- that the plaintiff is
18 without subject matter jurisdiction for lack of a valid
19 assignment, and therefore has no statutory standing under
20 ERISA --

21 And we have asked plaintiff's counsel for evidence
22 that the assignment is proper. And just -- just to clarify
23 for one big moment, the assignment of benefits is signed by
24 somebody who purports to be the wife of the participant in
25 the party. Your Honor, as I understand the issue's about

1 whether or not the person was actually married or was married
2 to the participant. But in any event, we've asked for and
3 have not received some sort of power of attorney that would
4 enable a -- wife to receive the authorization to then assign
5 a property right such as an assignment of benefits.

6 We have not received that, and without that, it is
7 our belief and our contention that the hospital is without
8 statutory standing, because it is neither a participant or a
9 beneficiary and -- with the proper authorization.

10 And respectfully, Your Honor, we believe that this
11 case should be put on ice subject to -- the motion to dismiss
12 for lack of subject matter jurisdiction.

13 THE COURT: Well, let me turn to the plaintiffs.
14 Are you -- am I correct, Mr. Hirsch [sic], you're relying on
15 a series of decisions -- I don't have them in front of me --
16 including a few recently authored by Judge Chesler that deals
17 with this assignment issue and whether there's an assignment
18 that confers jurisdiction? Or am I thinking of the wrong --

19 MR. HIRSCHHORN: No, Your Honor, I -- I believe I
20 know the decision that you're referring to, Your Honor. I
21 believe that those decisions, and there's been a lot of case
22 law, quite frankly, from multiple jurisdictions on the issue
23 of proper assignments over the past six or eight months.

24 THE COURT: Yeah.

25 MR. HIRSCHHORN: Those cases deal with issues about

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1 whether or not an assignee has a right to bring a claim, has
2 a right to bring a lawsuit, has a right to -- payment.

3 THE COURT: Oh, that is right, those --

4 (Simultaneous conversation)

5 MR. HIRSCHHORN: And those -- those -- I'm sorry?

6 THE COURT: Those are standing issues. Right?

7 MR. HIRSCHHORN: Well, I think some of them may be.
8 Others are what -- what is within the scope of the assignment
9 as opposed to whether there is a statutory standing. I think
10 they are mixed issues.

11 Here, we have a purely statutory standing argument
12 that we do not believe the hospital has a proper assignment.
13 They haven't conformed with efforts to prove to us that they
14 had standing.

15 THE COURT: All right. Let me hear from the
16 plaintiff.

17 MR. BARBATSULY: Your Honor, it's George Barbatsuly
18 for the plaintiff.

19 We think that the jurisdictional argument's
20 completely without merit. First of all, this is the person
21 who signed the assignment was, in fact, the patient's spouse.
22 We do have a marriage certificate, which we -- you know, we
23 are prepared to forward to the other side. And the
24 patient -- the patient who came in presented, was comatose.
25 Patient's spouse was making all the patient -- the benefits

1 decisions, was interacting with the plan.

2 So factually, the plan has known for over a year
3 and a half that the patient's spouse was attending to these
4 matters.

5 The plan itself makes reference to a covered person
6 being able to -- to enter into an assignment as a patient's
7 spouse. He clearly was a covered person.

8 And then thirdly as of -- you know, the patient has
9 since passed on, and the patient's spouse is still living,
10 and the case law supports the notion that the State take the
11 spouse as the successor in interest, has the ability to
12 confer standing.

13 So just -- you know, just to avoid any suspense
14 here, at the time of the admission, the patient's spouse
15 signed an assignment because the patient was physically
16 unable to. When this was brought to our attention -- and
17 it's been a recent development, so we will be forwarding this
18 information -- the patient's spouse now, in her capacity as
19 successor in interest to the patient, has executed a new
20 assignment which -- which I think, puts this question to
21 rest. In a case that was recently decided by Judge Vazquez,
22 you know, specifically rejected similar arguments that the
23 assignments, you know, were not valid. We think that any
24 assignment was valid at all times, but just as a
25 belt-and-suspenders, we're prepared to present evidence of a

1 new assignment that's valid under Judge Vazquez's opinion; it
2 doesn't matter when the assignment was -- was executed.

3 And with respect to the opinions that have been
4 cited, they just -- you know, the Judge Chesler opinions
5 focus on the language. I don't think there is any dispute
6 that the language of the assignments are sufficient, and
7 most -- and more importantly, the Third Circuit just this
8 past fall said that the language -- you know, that the
9 language didn't even need to be as broad as what
10 Judge Chesler had been finding, and as long as the assignment
11 conveys the right to payment to the hospital, that's
12 sufficient, and we -- we more than have that.

13 So, I mean, if they want to brief the issue, it's
14 their prerogative. We think that that's going to go nowhere.
15 And we don't see any basis for holding up the rest of
16 discovery.

17 THE COURT: All right.

18 MR. HIRSCHHORN: Your Honor, Russell Hirschhorn
19 here.

20 The case law is clear that a spousal relationship
21 does not confer authority to assign benefits. That -- that
22 is their contention here. That contention is without merit.

23 And I respectfully suggest that we establish
24 a briefing schedule. We do have a pending -- there are
25 pending motions to dismiss here on other grounds. But as

1 everybody is well aware, subject matter jurisdiction is not
2 something that can be waived and should be taken up at any
3 time.

4 THE COURT: Let me hear from the plaintiff, what
5 sort of discovery are you proposing here?

6 MR. BARBATSULY: Well, going back to the
7 grandfather issue, Your Honor.

8 THE COURT: Yeah.

9 MR. BARBATSULY: Because I think that's the point
10 in contention that Your Honor started with, now, Your Honor
11 has ordered that the parties engage in discovery which is
12 limited to the administrative record as well as on the
13 question of whether the plan at issue is or is not
14 grandfathered under the Affordable Care Act. We had a
15 meet-and-confer with counsel for the benefit -- United
16 Benefits Fund and Aetna, who advised us that they were going
17 to be relying for their grandfathering position on 42 U.S.C.
18 -- 18011(d). That's essentially a collective
19 bargaining -- a provision of the Affordable Care Act that
20 provides that for health insurance coverage maintained by one
21 or more collective bargaining agreements between employer
22 representatives and employers -- and this is the operative
23 language -- that was ratified before March 23rd, 2010, the
24 statute provides the plan is grandfathered until the date on
25 which the last of the CBAs who were waiting for that coverage

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1 terminate.

2 So counsel for UBF had said, well, we have -- we
3 have a CBA that covers -- that -- that it was, you know --
4 pursuant to which health coverage under the UBF was
5 maintained. It was -- it was in effect for March -- it was
6 in effect at the time of the enactment of the Affordable Care
7 Act, and it remains in effect. And we're relying on that CBA
8 for our grandfathering position.

9 It turns out that the CBA purports to have an
10 effective date or March 1, 2010, and remains in effect, but
11 there's indication on the face of the CBA that was provided
12 to us as to when it was actually ratified, and ratification
13 is what's built into the statute as the appropriate standard.

14 In our experience with CBAs, it's very common that
15 CBAs will be ratified sometime after the effective date and
16 made retroactive. We don't know if that's the case here, but
17 what we're asking for is discovery from the parties to the
18 actual CBA, the union and the employer, basically designed to
19 elicit information on -- two minimal questions: Number one,
20 when was the CBA ratified? And number two, is the CBA
21 actually in effect? Which is what the UBF has represented.

22 As -- discovery, we submit that it falls squarely
23 within the scope of what Your Honor ordered when Your Honor
24 said that we were entitled to discovery on the question of
25 grandfathering, and since the UBF has proffered this

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1 collective bargaining agreement as the basis for
2 grandfathering, or at least one of the bases, we believe that
3 this limited discovery will -- is designed to test that. And
4 we're entitled to it.

5 THE COURT: Let me ask a follow-up question. How
6 would you --

7 MR. HIRSCHHORN: Your Honor, could I -- this is --
8 can I address some of the --

9 THE COURT: No, can I ask my question first,
10 please. Thank you.

11 How will you determine through discovery, what
12 discovery to look for to determine whether the CBA is still
13 in effect? Are you talking about purely paper discovery
14 or -- you're not looking for depositions, are you?

15 MR. BARBATSULY: Well -- for third parties, I think
16 that we would want some limited document discovery on the
17 issue. In theory, we'd want some -- you know, some sort of
18 sworn testimony, if the proffer is that the CBA's in effect,
19 here are the documents that prove it, we -- you know, it
20 could be through a certification, and -- but I think we'd
21 want to serve a notice -- you know, a subpoena, you know,
22 with a deposition notice attached to it that would be limited
23 to that -- you know, well -- I mean, the threshold question
24 is the ratification date, because I think that's -- and
25 that -- that should be an easy question for both the employer

1 and/or the union to answer.

2 And so the -- you know, the -- we would seek
3 documents and then presumably a limited deposition on that
4 limited question of the ratification date, and then, you
5 know, similarly what the effective date. I mean, I don't
6 expect these to be very lengthy inquiries. They're pretty
7 simple. But obviously as Your Honor alluded to, it makes a
8 huge difference to the value of the case whether it's a
9 \$776,000 case or close to \$7.7 million case, and Your Honor
10 indicated that that's an important issue to resolve upfront.

11 So the limited, you know, information we're seeking
12 from third parties, we submit, is, you know -- is appropriate
13 to go to that -- for that particular issue, particularly
14 since the plan has proffered the CBA as the -- as the
15 argument for grandfathering.

16 THE COURT: All right. Go ahead. Somebody else
17 wanted to say something?

18 MR. LISTHAUS: Yes, Your Honor, this is Bruce
19 Listhaus. For -- on counsel's point, yeah, that's -- that's
20 just one basis. There are other bases that we're relying
21 upon. We figure that this one -- you know, we put it to bed
22 very quickly and that is a -- it is a contract. You know --
23 going to the statute. The four corners of the document are
24 clear. It's dated prior to the date of the important date of
25 the statute, prior to March 23rd.

1 And we figure, you know, that would just put the
2 whole issue to bed.

3 Now, counsel is raising this question of
4 ratification, which we don't really agree with. First of
5 all, this particular union did not require ratifications of
6 their contracts. So, in fact, there is no ratification of
7 the contract. The date that it went into effect -- and by
8 the way, the statute uses the word "in effect," in addition
9 to using the language "ratify." So in this context that -- I
10 mean, we think it's pretty clear that that was going on.
11 This contract on its face was in effect as of March 1st,
12 2010, and so we believe that, you know, that puts the
13 question to bed.

14 But leaving that aside, let's assume for argument's
15 sake that counsel would be able to knock off that argument.
16 So first of all, we believe it's -- we -- as far as --
17 contracts that would satisfy that. We just presented this
18 one because, as I said, I thought that would be the easiest
19 way to go.

20 But in addition to that, we provided them with a --
21 an independent basis under the statute, which is that if the
22 plan continues to exist with -- in line with the statutory
23 requirements, then regardless of the collective bargaining
24 agreement exemption, it's still considered to be
25 grandfathered. So there is that second basis.

1 So let's assume they knock down basis number one,
2 so then you're going to allow, you know, unfettered discovery
3 with regard to basis number two?

4 And then even assuming that all the -- knocked out,
5 the only -- you know, I think more has been made of the
6 grandfathering issue in this litigation than perhaps needed
7 to be, because even assuming that we go down the
8 nongrandfathered route -- approve one of these things, so
9 then the only time that the -- becomes relevant is if we're
10 dealing with emergency care.

11 Now, their position that this is a patient who was
12 in the emergency room, in the emergency room for about a
13 year, would suggest -- emergency care. We totally object to
14 that as well, you know, under the definition of the statute.

15 So there is so many layers of this onion that need
16 to be peeled that we believe just the why -- you know, is the
17 person -- again, we thought that we would be able to just
18 satisfy the issue at the outset and then move on.

19 The last point I want to make is that even assuming
20 all of that were -- were to come to pass, the -- counsel is
21 saying that there's a difference there between \$700,000 and
22 \$7 million. That's not the case. The statute under the
23 emergency care out-of-network situation would require that
24 the plan pay the greater of in essence, the Medicare rate or
25 what the in-network rate would be under this plan.

1 Now, we don't know exactly what the in-network rate
2 of -- of compensation would be, but it's nowhere near the
3 number that the other side is talking about. We believe that
4 the Medicare rate is about \$13,000 or so. The opposition
5 believes that's it's about \$750-, or \$800,000 or so.

6 There's no way that they'd get up to their -- you
7 know, million dollar number or anywhere near that number,
8 based upon in-network compensation rate.

9 So, again, we believe that the -- they're making a
10 lot more out of it.

11 And certainly, in light of the two motions to
12 dismiss that are currently pending, as well as now the third
13 issue, the subject matter jurisdictional issue, which clearly
14 is in the threshold -- it doesn't make sense to allow -- to
15 start doing things until we resolve those -- preliminary
16 issues.

17 THE COURT: Let me turn back to Mr. Barbatsuly.

18 So what of defense counsel's point that even if --
19 even if you could show the ratification, it wouldn't matter
20 under the -- their alternative theory that if the plan
21 continues to exist basically in line with that provision of
22 the Affordable Care Act, it would still be grandfathered.
23 Why are we going down this ratification road if there's still
24 an alternate basis that knocks out your claim?

25 MR. BARBATSULY: So I mean, first of all, the

1 argument, as we just heard it, the first time that it was
2 clearly articulated to us and, you know, obviously we didn't
3 articulate in the letter, but we -- I mean, basically what we
4 understand the fund is relying on for this alternative
5 argument is they produced to us a handful of documents
6 purporting to describe what's labeled as sterling plan.
7 They're minimal on their face. We don't answer the question
8 whether the plan meets the grand- -- the separate independent
9 grandfathering requirements under the -- under the regulation
10 45 C.F.R. 147.140. And in particular is there series of
11 things that can result -- each independently can result in
12 the loss of grandfathering, one of which is the elimination
13 of benefits. Another is change in cost sharing and there --
14 there are a number of them. And in particular what the
15 documents that we've been provided to this point do not
16 indicate is whether all or substantial all the benefits have
17 been eliminated to diagnose or treat a particular condition.

18 And we are also relying on the fact that just by
19 virtue of the dramatic underpayment that has occurred in our
20 case, it's indisputable evidence that they -- all or
21 substantially all of the benefits to diagnose particular
22 condition for the treatment for which Patient 1, that
23 Patient 1 received.

24 So our view is that the documents they provided
25 don't answer the question, number one. And even if they did

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1 answer the question, they've since lost grandfathering status
2 by the position they've taken in our case, which is that
3 essentially I -- you know, the overwhelming majority of the
4 treatments that was provided to Patient 1 for his almost
5 year-long stay while he was in -- you know, in distress is
6 not covered.

7 So that loses -- and on top of that, Aetna has told
8 us that they want -- of the 12,000, they want 8,000 back. So
9 that's, you know, separately -- so all of these things that
10 have happened, we submit, you know, completely eviscerate the
11 grandfathering under the -- under the alternative prong that
12 they're relying on, 45 C.F.R. 147.40, which is why, you know,
13 we -- we suspected they were relying so heavily at the outset
14 on the CBA section, because we -- we assumed they just -- be
15 grandfathering under the alternative prong.

16 So it certainly matters, the status of the CBA
17 matters, and now we're being told on this call for the first
18 time that in addition to what they've presented, they may
19 have other CBAs that they're going to try to dig out to
20 further their grandfathering argument. You know, so
21 that's -- that's just tells us that, you know, Your Honor was
22 absolutely right to order discovery on this question of
23 grandfathering, and that just tells us that discovery is,
24 indeed, needed on this question.

25 MR. HIRSCHHORN: Your Honor, Russell Hirschhorn, if

1 I may be heard?

2 THE COURT: Yeah.

3 MR. HIRSCHHORN: I'm listening to the
4 back-and-forth between counsel for UBF and Aetna, and for
5 plaintiffs, and recognizing that Your Honor ordered --
6 previously ordered some discovery and what scope of -- what
7 at Court had in mind as pertains to the scope of that
8 discovery, I think the Court knows.

9 But -- but what we're talking about here
10 potentially is the scope of damages. And to engage in
11 third-party discovery -- or any discovery for that matter --
12 at a time when there are mo- -- dispositive motions pending
13 and a -- a subject matter jurisdictional issue that is more
14 than plausible, that should be based, I think it's a waste of
15 resources on behalf of all parties -- the Court, I
16 respectfully request again that it we set some sort of
17 briefing schedule on that motion.

18 THE COURT: All right. I have carefully considered
19 the parties' submissions and of course carefully considered
20 their arguments today.

21 I'm going to allow the discovery that the plaintiff
22 seeks, and here's why. I certainly appreciate, Mr. Hirsch's
23 [sic] that the defense perceives there may be a subject
24 matter challenge. I also, though, at this point am in no
25 position to assess the relative merits or not of it.

1 Clearly, the plaintiff believes that it would be ready,
2 willing, and able to mount a significant challenge to it.

3 Stays in this district are heavily disfavored, in
4 any event, but I certainly recognize that subject matter
5 jurisdiction stands in something of a separate and unique
6 foot compared to other Rule 12 motions in that the Court must
7 always assess whether it has jurisdiction.

8 My problem is at this point, absent a motion, which
9 I will allow the defense to make, of course, I'm not in any
10 position to assess it, much less determine whether good cause
11 exists to stay discovery in light of it.

12 Moreover, I have already dealt with at the May 5th,
13 2016, conference the defendants' application to stay
14 discovery pending the resolution of the outstanding
15 Rule 12(b)(6) motions.

16 So I'm going to allow the discovery to go forward.

17 I appreciate the defendants' argument that (A) this
18 pertains to damages and that (B) there may be alternative
19 bases that may to some degree render the grandfathering issue
20 vis-à-vis the CBA moot. But the defendants have put the
21 issue of the CBA and grandfathering into play, and the
22 plaintiff is fairly entitled to discovery on that, even if
23 there may be some alternate basis, which the plaintiff
24 disagrees there is, that would knock out the plaintiff's or
25 severely the plaintiff's claims.

1 So nothing I have heard persuades me that this is
2 not anything less than relevant discovery, and, in fact,
3 arguably is already covered by the scope of the Court's
4 May 5th, 2016, order which provided for discovery on the
5 question of whether the plan at issue is or is not
6 grandfathered under the Affordable Care Act.

7 Now, the concern I have is that this not turn into
8 runaway discovery on what should be a relatively narrow
9 question. I would certainly anticipate, though, on the
10 question of ratification, unless I'm significantly mistaken,
11 which is always possible, I would expect that to be
12 answerable on the face of documents. Either there would be
13 an actual ratification and minutes -- whether it's a board
14 meeting or a union trustees meeting that ratified it or some
15 other actual notice -- memorialization of ratification, I
16 would think that that would be sufficient on that issue.

17 Regarding the issue of when the CBA went into
18 effect, I'm going to authorize the written discovery that the
19 plaintiff seeks, but limited to not more than five document
20 requests to be served on each of the parties articulated in
21 plaintiff's June 3rd memo, and one notice of deposition for
22 each of the employers and the union.

23 I'm also going to impose a 90-day deadline to
24 complete that. So the plaintiff is going to serve those
25 document production requests by June 28th, responses due

1 within 30 days, and this is going to be done on this point by
2 September 14th. We'll have a status phone conference before
3 then, so if there are any particular difficulties, you folks
4 can apprise me of that.

5 Regarding the motion for -- to dismiss for lack of
6 subject matter jurisdiction, Mr. Hirsch, you tell me when you
7 think you can have that in.

8 MR. HIRSCHHORN: My understanding, Your Honor, is
9 that motions are due 24 days before a motion date, which I
10 think realistically I think -- I think we need to get it in
11 by the July 8th date to -- the August 1st motion date.

12 THE COURT: Correct.

13 MR. HIRSCHHORN: Which is more than doable.

14 THE COURT: Okay. So July 8th. Opposition then
15 due July 18th. And reply July 25th.

16 Okay.

17 MR. HIRSCHHORN: Your Honor, can -- Russell
18 Hirschhorn. May I ask a point of clarification on
19 Your Honor's order?

20 THE COURT: Mm-hmm. Go ahead.

21 MR. HIRSCHHORN: With respect to the document
22 requests, I represent defendant Omni -- which is plan
23 administrator. We have no relevant relating to this issue as
24 to whether plaintiff is grandfathered, and I just would like
25 clarification -- one to make clear that the document requests

1 | are not intended for defendant Omni.

2 | THE COURT: No, I mean although you were quite
3 | vocal during this conference, which is all fair advocacy,
4 | Mr. Barbatsuly, do you agree that Omni does not really
5 | have -- on this issue of the grandfathering, doesn't really
6 | have a -- a horse in the race. Right?

7 | MR. BARBATSULY: Well, I don't know the answer to
8 | that question, and, you know, we -- we, you know, as the
9 | designated plan administrator that's specifically --

10 | THE COURT: They would have ratify- -- as the plan
11 | administrator, though, they wouldn't have ratified it. They
12 | don't -- if I -- unless my understanding of ERISA is
13 | seriously mistaken, and they become relevant after the plan
14 | has actually been ratified to administer the now-ratified
15 | plan.

16 | MR. HIRSCHHORN: It's -- Your Honor, it's Russell
17 | Hirschhorn, the collective bargaining agreement that gets
18 | ratified --

19 | THE COURT: I'm sorry. --

20 | MR. HIRSCHHORN: -- it's not --

21 | THE COURT: Right. It's -- that's right. I'm
22 | sorry, I misspoke.

23 | Yeah, I mean, look, no, I don't see -- if
24 | Mr. Barbatsuly, if you want to come back to me and make an
25 | argument as to why you think either (A) the discovery that

1 you got was insufficient or (B) why you think it's
2 insufficient and Omni is going to have that relevant
3 discovery, quite honestly, I'd be really surprised by that as
4 the plan administrator wouldn't -- as Mr. Hirsch points out,
5 what you're really talking about is ratification of the CBA.
6 But you can come back and let know why you would need
7 discovery from them.

8 But at least for now, I'm excluding Omni from the
9 discovery on this issue.

10 MR. BARBATSULY: Thank you, Your Honor.

11 THE COURT: All right. What I'm going to do is I'm
12 going to ask you folks to please hold on. What I would
13 suggest we do is talk again in or around the second week of
14 September, right around the end date for this limited
15 discovery that we're talking about. So let me do this, I'm
16 going to put you -- go ahead, did somebody want to say
17 something?

18 MR. LISTHAUS: Yes, please, Your Honor, Bruce
19 Listhaus is speaking here. One point that I -- from --
20 addressed is that plaintiffs concede that they need to amend
21 their complaint at this point, second amended complaint. And
22 in order to do that, they really need to put in a motion to
23 amend complaint. And, you know -- so we're talking about now
24 I believe another motion that has to go in there before they
25 can even pretend that they've got subject matter jurisdiction

1 here.

2 THE COURT: Well, this is the first I'm hearing of
3 this.

4 So, Mr. Barbatsuly, do you want to respond?

5 MR. BARBATSULY: Well, as you know, you can -- in
6 the letter that the assignment that we provided to the -- to
7 defense was actually signed by the -- by the wife. We had
8 been operating under, you know, a misimpression that the
9 assignment had been signed by the patient because of the name
10 and it had been -- the name had been -- was the name.

11 We -- you know, and in response to the -- you know,
12 the early information exchange in the meet-and-confers, we
13 provided the -- the correct -- we provided assignment,
14 counsel for UBF said that was not -- didn't pertain to the
15 patient and they were correct, and we promptly supplied the
16 actual assignment, which is the -- was the one that was
17 executed by -- by the spouse.

18 So the only change that we would contemplate, if
19 needed, by way of amendment would be to actually edit the
20 complaint to reflect that the assignment was signed by the
21 spouse. It doesn't impact the jurisdictional argument that
22 counsel for Omni has identified and so insofar as that --
23 yeah, I would submit that that jurisdictional issue be, you
24 know, to the extent obviously, if they consented to our
25 amendments, that would moot this issue, but to the extent

1 | they do not consent, the jurisdictional argument be done by
2 | way of -- you know, that our motion for leave would be by way
3 | of cross-motion in response to jurisdiction. So I think it
4 | can be all briefed at the same time.

5 | The only argument that I would anticipate that
6 | would be made in response would be to utility, because they
7 | would argue that the wife signing the assignment, you know --
8 | meant that there was no jurisdiction, so I don't think it
9 | changes the analysis that's going to be required to be made
10 | by the Court. So, you know, to the extent that there needs
11 | to be a motion, you know, it ought to be part of the same
12 | round of briefing that Your Honor just identified.

13 | MR. LISTHAUS: Well, at this moment we do not have
14 | a complaint that confers jurisdiction upon the Court. And
15 | counsel is quite correct, as he pointed out in the joint
16 | letter submitted on Friday, that we will absolutely be
17 | opposing that motion to amend as being futile.

18 | THE COURT: Well, we could do that --

19 | (Simultaneous conversation)

20 | THE COURT: You could do that and present it as a
21 | cross-motion. I don't see -- I don't see why it can't be
22 | disposed of most efficiently that way.

23 | All right, counsel, please hold, we'll get you a
24 | date for that phone conference.

25 | (Conclusion of proceedings at 3:42 P.M.)

|Teleconference
|16-cv-00168, June 14, 2016
Certification

27

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